UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Lykos

Mailed: July 16, 2007

Opposition No. 91164080

Omega SA

v.

Richard J. Oldenburg

Before Hohein, Zervas and Walsh, Administrative Trademark Judges.

By the Board:

On December 5, 2003, Richard J. Oldenburg ("applicant") applied to register the mark OMEGA for "golf clubs, golf bags, golf gloves, divot repair tools, golf ball markers, golf tees, golf balls and non-motorized golf carts" in International Class 28, alleging a bona fide intent to use the mark in commerce.[1] Omega S.A. ("opposer") has opposed registration on the grounds that applicant's applied-for mark so resembles opposer's previously used and registered marks that it is likely to cause confusion, mistake, or deceive prospective consumers under Section 2(d) of the Lanham Act. In its notice of opposition, opposer pleaded ownership of several registrations for goods involving watches, timepieces, and related items. Opposer also

pleaded ownership of an application (filed January 31, 2001) which, during the course of this proceeding on September 19, 2006, matured into Registration No. 3146117. The registration is for the mark displayed below:

for "retail store services featuring telephones, portable telephones, spectacles, sunglasses, magnifying glasses, watches, clocks, horological and chronometric instruments and their accessories, goods of precious metal or coated herewith, precious stones, jewelry, articles of leather and imitation leather and morocco-dressing, traveling bags, umbrellas, pins not of precious metal, key rings of metal, knives, mirrors, stationary, pens and pencils, bags and boxes of paper, clothing, head gear, textile goods, golf equipment and accessories, smoker's articles," in International Class 35, and alleges March 23, 2006 as the date of first use anywhere and in commerce.

In his answer, applicant denied the salient allegations contained in the notice of opposition.

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[1] Application Serial No. 78337297.

This case now comes before the Board for consideration of opposer's motion for summary judgment filed December 14, 2006. The motion is fully briefed.[2]

The Board has carefully reviewed the parties' respective arguments and accompanying exhibits, although the Board has not repeated the parties' arguments in this order.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). Thus, all doubts as to whether any factual issues are genuinely in dispute must be resolved against the moving party and all inferences must be viewed in the light most favorable to the non-moving party. *See Olde Tyme Foods Inc. v. Roundy's Inc.,* 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

After reviewing the submissions and arguments of the parties, we find that opposer has failed to sustain its burden on summary judgment. At a minimum, opposer has not

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[2] The Board has exercised its discretion to consider opposer's reply brief because it clarifies the issues herein. *See* Trademark Rule 2.127(a).

established the absence of a genuine issue of material fact regarding the issue of priority. Opposer, in support of its motion for summary judgment, relies on its newly matured Registration No. 3146117 to establish priority. More specifically, opposer contends that Registration No. 3146117 "provides a constructive date of first use that is prior to the filing date of the contested application in this proceeding." Opposer's Reply Brief, page 4. However, opposer failed to submit a certified copy of the registration showing that the registration is subsisting and owned by opposer. *See, e.g., King Candy v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Instead, opposer submitted the declaration of its attorney, Brendon J. Reilly, with a photocopy of the registration attached thereto. The declaration from Mr. Reilly merely states that the photocopy is a "true and correct copy of U.S. trademark registration no. 3146117," thereby failing to establish both the current status of and title to the registration. *See* TBMP §704.03(b)(1)(A) (2d ed. rev. 2004). In addition, opposer has failed to establish the absence of a genuine issue of material fact that it made common law usage of its mark in connection with the services identified in Registration No. 3146117 prior to applicant's

constructive use date (that is, the filing date of applicant's application).

Lastly, with regard to opposer's remaining pleaded registrations, genuine issues of material fact exist as to the relatedness of opposer's goods identified therein vis-à-vis the goods identified in applicant's application.

In view thereof, opposer's motion for summary judgment is denied.[3]

Proceedings herein are resumed and trial dates are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	CLOSED
30-day testimony period for party in position of plaintiff to close:	9/20/07
30-day testimony period for party in position of defendant to close:	11/19/07
15-day rebuttal testimony period for party in position of plaintiff to close:	1/3/08

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

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[3] The parties should note that all evidence submitted in support of and in opposition to the motion for summary judgment is of record only for consideration of said motion. Any such evidence to be considered in final hearing must be properly introduced in evidence during the appropriate trial periods. *See Levi Strauss & Co. v. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); and *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983).

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.